the reason the remedy had been taken away—was made enforceable by the bankrupt's conduct and hence was fraudulent. To this position the court refused to accede, preferring to believe that the claim was not unenforceable until "the bankrupt had already pleaded the statute in bar of the indebtedness, or had determined so to do." Had the bankrupt always intended to pay the indebtedness and had reached a decision to forego the advantage of this special defense in case suit were brought, by this act he has not altered his position. He could not, prior to bankruptcy, have been compelled to plead the statute of limitations, since it is a matter of privilege exercisable at his option. If the bankrupt had pleaded the statute prior to his bankruptcy, and later in contemplation thereof, attempted to rehabilitate such claim or moral obligation, merely that the owner might participate in the dividends to the detriment of other lawful creditors, an entirely different situation would have been confronted, concerning which the decision intimates a likelihood that the court would find fraud from such facts alone. But in the instant case, no evidence of fraud was available aside from the act itself here complained of, and the court insists that it was to be explained consistently on the theory that no fraud existed. The general principle has long been recognized that a debt or claim once valid and otherwise provable in bankruptcy, but barred by the operation of the statute of limitations in the state where the alleged bankrupt is domiciled and the bankruptcy proceeding is pending, cannot be allowed. *In re Lipman,* 94 Fed. 353; *In re Resler,* 95 Fed. 804; *In re Putnam,* 193 Fed. 464; *In re Wooten,* 118 Fed. 670; *Pace's Trustee* v. *Pace* (Ky. 1915), 172 S. W. 925; *Ex Parte Dewdney, Ex Parte Seaman,* 15 Ves. Jr. 479; *In re Noesen,* Fed. Cas. 10288. The fact that the debt is not barred under the statute of some other state, i. e., that in which the creditor resides or of which both parties were inhabitants when the contract was made, is of no avail. *In re Kingsley,* Fed. Cas. 7819; *Hargadine-McKittrick Dry Goods Co.* v. *Hudson,* 122 Fed. 232, 234; *In re Hardin,* Fed. Cas. 6048; *In re Resler,* 95 Fed. 804; *sed vide* argument in support of contrary rule in case of *In re Ray,* Fed. Cas. 11589. Including in the schedule of debts a claim already barred is not such formal recognition of its validity as to make it provable against the bankrupt's estate, to the prejudice of other creditors; but it devolves upon the trustee in bankruptcy to oppose the allowance of the claim on the ground of limitations, in behalf of the creditors. *In re Wooten,* 118 Fed. 670; *In re Lipman,* 94 Fed. 353; *In re Resler,* 95 Fed. 804; *In re Banks,* 207 Fed. 662; *In re Kingsley,* Fed. Cas. 7819; *In re Ray,* Fed. Cas. 11589; *In re Hardin,* Fed. Cas. 6048.

BANKRUPTCY.—PARTNERSHIP AND INDIVIDUAL CREDITORS.—Two partners, each acting with the consent of the other, withdrew money from the assets of the partnership on the day preceding its adjudication in bankruptcy, at a time when the partners were insolvent, but prior to filing a petition against either of them. Demand by trustee in bankruptcy that the same be returned was refused. *Held,* that there was no means of compelling restitution, as the Bankruptcy Act of 1898, sec. 5f, providing that the net proceeds of the partnership property shall be appropriated to the payment of partnership debts,

and the net proceeds of the individual estate of each partner to the payment of individual debts, applies to the property constituting partnership and individual assets at the commencement of the bankruptcy proceedings and to property fraudulently transferred, and the power of the partners to transform individual property into partnership assets and partnership assets into individual property, continues until actual control thereof passes into the hands of the court. *Crawford* v. *Sternberg* (C. C. A.) 220 Fed. 73.

The partners had each, with the consent of the other, applied a portion of the money so taken in satisfaction of individual debts, and neither had other assets aside from what remained as the unexpended residue of this sum, which they now claim is within the statutory exemption. Under such circumstances the court holds that the inability to pay is a sufficient defense to a demand for its return; one cannot be compelled to yield up that which he has not. *Boyd* v. *Glucklich,* 116 Fed. 131; *In re Goldfarb Bros.,* 131 Fed. 643, 645; *Trust Co.* v. *Wallis,* 126 Fed. 464; *Warren* v. *Rosenberg,* 94 Wis. 523; *In re Mitz,* 172 Fed. 945; *In re La Plume Condensed Milk Co.,* 145 Fed. 1013. And the money so expended was not subject to an order for its return as a part of the partnership estate, for the further reason that it had been applied, by the consent of the partners in good faith, to the payment of individual debts of the partners, before the partnership had been dissolved or the property brought into the custody of the court. The concurrence of these various elements makes such transaction legal. *Sargent* v. *Blake,* 160 Fed. 57; *Huiskamp* v. *Moline Wagon Co.,* 121 U. S. 310; *Schmidlapp* v. *Currie,* 55 Miss. 597 (solvent firm); *Case* v. *Bureauregard,* 99 U. S. 119; *Rice* v. *Barnard,* 20 Vt. 479, 485; *Fitzpatrick* v. *Flannagan,* 106 U. S. 648; *In re Suprenant,* 217 Fed. 470; *Sigler* v. *Bank,* 8 Ohio St. 511; *Allen* v. *Center Valley Co.,* 21 Conn. 130; *Bank* v. *Sprague,* 20 N. J. Eq. 13; *Purple* v. *Farrington,* 21 N. E. 573; *Contra*: *Jackson* v. *Durfrey,* 72 Miss. 971. There seems to be abundant authority to the effect that while the right of firm creditors to go against the firm property in postponement of such right by creditors of individual members is in its nature a derivative right, dependent upon the rights of firm members and the equities of the partners *inter se;* and that while such right is lost in the *bona fide* waiver of such by the partners, yet it is not lawful for the members of the firm, in *contemplation* of insolvency, to divert the firm property, and apply it to the liquidation of the indebtedness of individual members, or to convert the joint estates into estates in severalty, to prevent its being seized by firm creditors. *Ex Parte Mayou,* 4 De Gex, J. & S. 664; *Ex Parte Snowball,* 7 Ch. App. Cas. 534; *Cribb* v. *Morse,* 77 Wis. 322; *Cron* v. *Cron's Estate,* 56 Mich. 8; *Menagh* v. *Whitwell,* 52 N. Y. 146; *Phelps* v. *McNelley,* 66 Mo. 554; *Rayburn* v. *Mitchell,* 106 Mo. 365; *Patterson* v. *Seaton,* 70 Ia. 689; *Gallagher's Appeal,* 114 Pa. St. 353; *Darby* v. *Gilligan,* 33 W. Va. 246. But it seems equally well settled that it is not a fraudulent act by an individual who knows he is insolvent to convert a part of his property which is not exempt into assets which are exempt for the purpose of claiming his exemptions therein, and of thereby placing it out of the reach of his creditors. *Flask* v. *Tindall,* 39 Ark. 571; *In re Irvin,* 120 Fed. 733; *O'Donnell* v. *Segar,* 25 Mich. 367; *First Nat. Bank* v. *Glass,* 79 Fed.

706; *In re Wilson,* 123 Fed. 20, (*Vide* cases cited in instant case). If it is not fraudulent for an individual debtor to convert property which is not exempt into that which is, it is not fraudulent for individuals constituting a partnership to sever the joint interest in partnership property, which is not yet in the custody of the law, and thereafter to hold their exemptions out of such property. *Goudy* v. *Werbe,* 117 Ind. 154; *Mortley* v. *Flanagan,* 38 Ohio St. 401; *Lee* v. *Bradley Fertilizer Co.,* 44 Fla. 787; *Fairfield Shoe Co.* v. *Olds,* 176 Ind. 526; *In re Phillips,* 209 Fed. 490, 492; *Bates* v. *Callender,* 3 Dak. 256, 16 N. W. 506; *In re Bjornstad,* Fed Cas. 1453.

BANKRUPTCY.—PROVABILITY OF RIGHT OF ACTION IN TORT OR IN CONTRACT. —In an action for damages against a physician for mal-practice, discharge in bankruptcy being duly pleaded, *held,* that since the plaintiff at his optnoi, prior to the bankruptcy proceedings, might have sued defendant either in an action *ex delicto* or *ex contractu,* the claim was, therefore, provable under the Bankruptcy Act of 1898. § 63a (4) and hence was discharged by defendant's bankruptcy. *Reinhardt* v. *Friederich* (Ind. App. 1915) 108 N. E. 258.

In the case *Matter of John Wigmore & Sons Co.,* 10 Am. B. R. 661 (1903) petitioner sought to have the court liquidate a claim for personal injuries arising out of the failure of the bankrupt, in accordance with the contract of employment, to furnish safe appliances to petitioner while the latter was in bankrupt's employ. The court, disregarding the protests of petitioner that his declaration drawn under the Code of California was an action *ex contractu,* held it to be drawn on the theory of tort liability, and—since the tort was not such as could be waived and general *assumpsit* substituted therefor on the ground of unjust enrichment of the tort-feasor's estate at the expense of the petitioner—held that it was not a provable claim within the class of "debts founded upon open accounts, contracts, express or implied." The instant case, to the contrary, recognizes the fact that suit at the outset might have been brought either for negligence or for breach of contract to render services with customary skill, and relying upon *Crawford* v. *Burke,* 195 U. S. 176, holds that the claim is provable in bankruptcy. The latter case was one of conversion of personalty by the bankrupt and the court decided that since the true owner might have waived the tort and sued on an implied contract, for that reason the claim was provable in bankruptcy proceedings. Accord: *Cole* v. *Roach,* 37 Texas 413; *Weaver* v. *Voils,* 68 Ind. 191; *Clarke* v. *Rogers,* 185 Fed. 518, 521; *Tindle* v. *Birkett,* 205 U. S. 183; *In re Filer,* 125 Fed. 261; *In re Hirschman,* 104 Fed. 69. All of these are cases in which the provable quasi-contract arose out of the unjust enrichment of the defendant, and it has been said (REMINGTON, BANKRUPTCY, § 636) that the rule of *Crawford* v. *Burke,* applies only in such cases. But the principal case holds, extending the rule of *Crawford* v. *Burke,* that where one has a cause of action of a dual nature, capable of being enforced either by an action *ex contractu* or *ex delicto,* it is provable in bankruptcy whether the tort liability is such as would support a *quasi* contractual action or not. Indeed, the nature of the tort liability is a matter of indifference if the contractual element be present in any form.